SUPREME COURT, U.S.

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In The

Supreme Court of the United States

..... TERM, [redacted] 1968

No. 1312

GRANT M. ACTON, E. L. FLACK, GEORGE HALL, J. J. HARRELL, JOE KINDRED, W. M. JENKINS, B. E. RADICAN, W. E. TONE, R. H. WINNIEGER, WALTER L. WOOLEY, JACK FISHER, JOE GENTRY, P. E. COE, F. H. LILLARD, M. R. HADDOX, INEZ ISELY (for Ray Isely), JOHN ISELY, JOHN O. RICKS, CLARA RICKS (for Sam Schuster), A. T. WILHITE, WALTER SHAW, HARRY PATTERSON, and W. A. JAMES,

PETITIONERS,

v.

THE UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals, Ninth Circuit, of October 4th, 1968, which became final on February 4, 1969, when rehearing, which was timely filed, was denied.

Opinion

The opinion of the court below is reported at 401 F.2d 896.

Jurisdiction

The judgment of the court below was entered on October 4th, 1968, and became final on February 4, 1969, when petitioners' Motion for Rehearing was denied. The case itself is an appeal to the court below in a civil case. The court below has affirmed the judgment of the District Court that petitioners have no interest subject to compensation in the condemnation proceeding which are the subject matter of the case. This Court has jurisdiction to review the United States Circuit Court of Appeals for the Ninth Circuit under 28 U.S.C. 1254.

Questions Presented

1. Where several persons have entered upon federal lands to prospect and mine for uranium ores with the knowledge of the governmental agency administering the lands in question, is an interest compensable in condemnation proceedings created under the Atomic Energy Act of 1954 by the successful location of uranium ores and the commencement of mining thereof?

2. Can the interest created by successful exploration and mining activities pursuant to the Atomic Energy Act of 1954 be limited to a revocable right of entry by the issuance (after commencement of condemnation proceedings) of permits giving such persons revocable rights of entry upon the lands in question?

3. Can a governmental agency take, without payment of compensation, interests created pursuant to the Atomic Energy Act of 1954 where the same taking on behalf of the Atomic Energy Commission would require compensation pursuant to the provisions of the Atomic Energy Act of 1954?

Constitutional Provisions Involved

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Article V, United States Constitution.)

Statutory Provisions Involved

"The Commission is authorized and directed, to the extent it deems necessary to effectuate the provisions of this chapter —

(a) to purchase, take, requisition, condemn, or otherwise acquire supplies of source material;

(b) to purchase, condemn, or otherwise acquire any interest in real property, containing deposits of source material; and

(c) to purchase, condemn, or otherwise acquire rights to enter upon any real property deemed by the Commission to have possibilities of containing deposits of source material in order to conduct prospecting and exploratory operations for such deposits.

Any purchase made under this section may be made without regard to the provisions of section 5 of Title 41, upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing by the Commission that advertising is not reasonably practicable. Partial and advanced payments may be made under contracts for such purposes. The Commission may establish guaranteed prices for all source material delivered to it within a specified time. Just compensation shall be made for any right, property, or interest in property taken, requisitioned, condemned, or other-

wise acquired under this section. Aug. 1, 1946, c.725, § 1, 68 Stat. 933." 42 U.S.C.A. 2096.

"The Commission is authorized, to the extent it deems necessary to effectuate the provisions of this chapter, to issue leases or permits for prospecting for, exploration for, mining of, or removal of deposits of source material in lands belonging to the United States: Provided, however, That notwithstanding any other provisions of law, such leases or permits may be issued for lands administered for national park, monument, and wildlife purposes only when the President by Executive Order declares that the requirements of the common defense and security makes such action necessary, Aug. 1, 1946, c.725, § 67, as added Aug. 30, 1954, c.1073, § 1, 68 Stat. 934." 42 U.S.C.A. 2097.

"The United States shall make just compensation for any property or interests therein taken or requisitioned pursuant to sections 2063, 2075, 2096, and 3128 of this title. Except in case of real property or any interest therein, the Commission shall determine and pay such just compensation. If the compensation so determined is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined, and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States for the district in which such claimant is a resident in the manner provided by section 1346 of Title 28 to recover such further sum as added to said 75 per centum will constitute just compensation. Aug. 1, 1946, c.724, § 171, as added Aug. 30, 1954, c.1073, § 1, Stat. 952, and amended Aug. 26, 1964, Pub.L. 88—489, § 17, 78 Stat. 606." 42 U.S.C.A. 2221.

Statement of the Case

Subsequent to the passage of the Atomic Energy Act of 1954,[1] and pursuant to the provisions of the Act, peti-

[1] Prior to the passage of the Atomic Energy Act of 1954, and on or about July 1, 1952, Public Land Order No. 848, by metes and bounds description, withdrew all public domain within the area later mined by petitioners. (17 Fed. Reg. 6099).

tioners prospected for, found and mined uranium ore bodies in the Muggins Mountains of western Arizona (T. 136, 168, 170-77). In locating and developing the uranium ore bodies, petitioners expended substantial time and funds, including the acquisition of specialized equipment and the establishment of geological surveys (T. 137, 139, 142). Source licenses from the Atomic Energy Commission had been received by petitioners pursuant to provisions of the Atomic Energy Act of 1954 prior to this case (T. 147, 150).

On January 15, 1958, the Department of the Army began these condemnation proceedings. Subsequent to the commencement of this case, the Commander, Yuma Test Station, acting in behalf of the United States Army, unilaterally issued to certain of the petitioners "Exploration Permits" stating, *inter alia,* as follows:

> "The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part as he deems is required by military necessity." (T. 154-57, 185-86).

Reasons for Granting the Writ

Sections 2096, 2097 and 2221 of the Atomic Energy Act of 1954 show a definitive Congressional policy of just compensation to those persons who have successfully located and mined for uranium ores pursuant to the Act. The licenses or "permits" issued by the Department of the Army, the governmental agency administering the lands, were issued subsequent to the condemnation proceedings and the substantial mining activities of petitioners.

The interest of petitioners must be determined and valued as of the time of the taking, the commencement of this case by the Respondent on January 15, 1958. *Olson v. United States,* (1933) 292 U.S. 246, 78 L.Ed.

1236, 54 S.Ct. 704.

It is our position that the court below erred when it found that the permits issued after the comemncement of condemnation proceedings define the interests of petitioners. Having entered the lands in question under the provisions of the Atomic Energy Act of 1954, it is this Act and the equity powers of the courts of the United States, acknowledged in *United States v. Town of Nahant,* (C.C.A. 1st, 1907), 153 F.Rep. 520 at 523, which must be determinative of petitioners' rights to compensation.

Under Sections 2096, 2097 and 2221 of the Atomic Energy Act of 1954, interests (even though mere rights of entry) are to be compensated if taken by the Atomic Energy Commission acting in furtherance of the policies established by the Congress. If the taking of petitioners' interests by a governmental agency other than the Atomic Energy Commission invalidates the compensatory provisions of the Atomic Energy Act of 1954, then pursuant to the equity powers of the United States courts as recognized in *Nahant,* it is respectfully submitted that petitioners are entitled in equity to receive just compensation for their interests.

The court below in its opinion commented as to the similarity between the instant case and the licenses granted under the Taylor Grazing Act, which licenses under the Taylor Grazing Act have been uniformly held not compensable in condemnation proceedings. The Taylor Grazing Act cases are inapplicable in this case because the permits granted to petitioners, which are similar to Taylor Grazing Permits, were issued *subsequent* to the institution of proceedings in this case, and *subsequent* to the mining activities of petitioners under

the Atomic Energy Act of 1954. Had the Department of the Army, charged with administering the lands, wished to limit petitioners' activities and interests, this could have been accomplished at any time during the years of petitioners' activities pursuant to 10 C.F.R. Sec. 60.9.

Conclusion

The court below erred in finding petitioners' interests arose by virtue of the permits issued by the Department of the Army, and thereby deprived petitioners of just compensation pursuant to sections 2096 and 2221 of the Atomic Energy Act of 1954. Should the condemnation by an agency other than the Atomic Energy Commission invalidate the direct compensatory provisions of the Atomic Energy Act of 1954, petitioners are nonetheless entitled to compensation under the laws of equity for their interests created pursuant to their activities under the Atomic Energy Act of 1954.

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February 2, 1969

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,980

GRANT M. ACTON, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21,980-A

V. W. CLIFTON,

vs.

UNITED STATES OF AMERICA,

Appellee.

[October 4, 1968]

On Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and ELY, Circuit Judges, and VON DER HEYDT *, District Judge.

VON DER HEYDT, District Judge:

This action was originated by the United States, appellee herein, in condemnation of certain property interests under Title 40, U.S.C. Section 257, and Title 10, U.S.C. Section 2663. The appeal is taken from the District Court's summary judgment entered November 3, 1966, declaring that the cancellation by the United States of appellants' revocable uranium prospecting permits was not taking of property under the Fifth Amendment to the Constitution of the United States for which the

* Hon. James A. von der Heydt, United States District Judge, Anchorage, Alaska, sitting by designation.

United States must compensate appellants.

The facts are these:

The Congress, seeking to develop adequate sources of uranium materials within the continental United States, enacted the Atomic Energy Act of 1954, 42 U.S.C. 2011 et seq. In doing so, Congress recognized that private funds and initiative would be required for such development and authorized a public appeal to individuals to prospect and develop uranium ore bodies on public lands of the United States.

Following enactment of the Atomic Energy Act of 1954, appellants, defendants below, prospected for uranium ore in the area of the Muggins Mountains of Western Arizona. Prior to that time, on July 1, 1952, Public Land Order No. 848 [1] had withdrawn all public domain within this area from all forms of appropriation under the Public Land Laws, including mining and mineral leasing laws.

Valuable ores were discovered by the various appellants who located claims under the mining laws of Arizona. Source material licenses from the Atomic Energy Commission were obtained by the spring of 1956.

By early 1958, the appellants had located a substantial number of claims in the area noted. It is uncontroverted that they expended substantial time and funds in the development of the claims, particularly for building roads, geological surveys, and the equipment needed in the preparation of the claims and to further actual mining operations.

The Department of the Army commenced the condemnation proceedings which are the subject of this action on January 15, 1958. When it filed is condemna-

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[1] 17 Fed. Reg. 6099, published July 8, 1952.

tion suit, the Government joined the appellants as defendants because certain records indicated that each appellant had claimed some type of interest. Also joined, among others, were numerous parties who, according to the records, had filed claims under the Taylor Grazing Act. Subsequently, the Government filed a motion to dismiss these particular defendants, alleging that they had been improperly joined since they had no compensable rights in the property. The district judge denied the motion "without prejudice to renewal at a later date." The District Court's ultimate granting of the Government's motion for summary judgment as against the appellants was based upon the ground which had been asserted in the previous motion to dismiss.

Subsequent to January 15, 1958, appellants applied for Atomic Energy Commission exploration permits, which permits were issued, and accompanied by a reservation in favor of the Commander, Yuma Test Station, reading as follows:

> "5. The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part at any time as he deems it required by military necessity. Such withdrawal may be temporary or permanent and may be without prior notice, in which event it is agreed that evacuation will be made with the greatest possible expediency, as to personnel and equipment."

Shortly after issue, the Commander of the Yuma Test Station, under the provisons of the reservation, terminated the prospecting permits. Thus, the uranium prospecting permits never reached maturity by the Atomic Energy's issuance of preferential right leases, as normally would have occurred in the absence of such revocation. No compensation has ever been paid appellants.

Because of these events, the appellants joined forces to prosecute their claims for compensation. The litigation encompasses an extended period of time eventually culminating in the filing of cross motions for summary judgment. As earlier indicated, the trial court granted appellee's motion and this appeal followed.

Appellants specify error as follows:

1. The District Court erred in finding appellants' interests in the lands in question were that of a revocable right of entry.

2. The District Couprt erred in its ruling that the interests of appellants' land in question were not an interest compensable under the laws of condemnation.

Since the assignments of error to a large exent are interrelated, they will be considered together in the general discussion which follows.

Appellants request this Court to exercise its "powers in equity" and "recognize" the value of the ore bodies located, the great expense to appellants, and declare their interests to be recognizable in condemnation. We are unable to do so.

While it is unfortunate, from the appellants' standpoint, that they lost whatever they may have gambled, it is clear that they were made fully aware of the uncertainty which was incident to their enterprise. As the District Court observed: "The defendants acquired the permits with full knowledge of the risks to be incurred." To reverse the findings of the trial court, we must ignore the great weight of authority upon the issues raised.

It is fundamental that when the United States takes private property for public use the Fifth Amendment require payment of just compensation. This obligation, however, recognizes only vested property rights, and not

the tenuous rights of licenses and permits, even though these at times may have value.

There have been cases in which certain unique interests have been recognized as private property and thus compensable within the meaning of the Fifth Amendment.[2] Unfortunately, appellants' situation does not fall reasonably within any of these circumstances.

The weight of authority is to the contrary. The Supreme Court for example, has held that a tenant whose lease contained a "termination on condemnation" clause had no right to compensation in a condemnation proceedig.[3] We find appellants herein, as in *Petty*, have "no right which persists beyond the taking and can be entitled to nothing."[4]

It is clear that a license does not constitute property for which the Government is liable upon condemnation, and passes to the licensee no estate or interest in the land.[5]

Appellee correctly notes the parallel which exists between appellants' prospecting permits and grazing permits upon public lands granted by virtue of the Taylor Grazing Act.[6] Grazing permits create no interest or estate in public lands, only a privilege which may be withdrawn. No property rights accrue to the licensee

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[2] *United States v. General Motors Corp.*, 323 U.S. 373 (1945), in which an estate or tenancy for years or at will was recognized as "private property." See also *United States v. Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. denied, 340 U.S. 820, and *Brooklyn Eastern Dist. Terminal v. City of N.Y.*, 139 F.2d 1007 (C.A. 2, 1944), cert. denied 322 U.S. 747.

[3] *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). See also *U.S. v. Marks*, 187 F.2d 724 (C.A. 9, 1951), cert. denied, 342 U.S. 823.

[4] 327 U.S. at 376.

[5] *McNeil v. Seaton*, 281 F.2d 931 (C.A.D.C. 1960). *Sinclair Pipe Line Co. v. U.S.*, 287 F.2d 175 (C.Cls., 1961).

[6] 43 U.S.C. 316 et seq.

upon revocation which are compensable in condemnation.[7]

Many permits issued by the United States have value as between private persons, but they may be revoked without payment of compensation. We refer particularly to the language of this court in *Osborne*:[8]

> Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e. g. bridge franchises, *Louisville Bridge Co. v. United States,* 1917, 242 U.S. 409, 37 S.Ct. 158, 61 L.Ed. 395; *United States v. Wauna Tool Bridge Co.,* 1942, 9 Cir., 130 F.2d 855; licenses to erect river and harbor structures, *United States v. Chicago,* M., St. P. & P. R. Co., 1941, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064; *Willink v. United States,* 1916, 240 U.S. 572, 36 S.Ct. 422, 60 L.Ed. 808; *Greenleaf Johnson Lumber Co. v. Garrison,* 1915, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; *United States v. Chandler-Dunbar Water Power Co.,* 1913, 229 U.S. 53, 70, 33, S.Ct. 667, 57 L.Ed. 1063; *Berger v. Ohlson,* 1941, 9 Cir., 120 F.2d 56; permits to erect and maintain telephone and power lines, *Swendig v. Washington Co.,* 1924, 265 U.S. 322, 44 S.Ct. 496, 68 L.Ed. 1036; *United States v. Colorado Power Co.,* 1916 8 Cir., 240 F. 217, 220; licenses to occupy, lease, or sell fishing areas, *Lewis Blue Point Oyster Cultivation Co. v. Briggs,* 1913, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083.

The Court in *Cox*, referring to the grazing permits

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[7] *United States v. Cox*, 190 F.2d 293, 294, 296 (C.A. 10, 1951), cert. denied, 342 U.S. 867; *Osborne v. United States,* 145 F.2d 892 (C.A. 9, 1944); *Bowman v. Udall,* 243 F.Eupp. 672, 678 (D.C. 1965), aff'd 364 F.2d 676, *sub nom. Hinton v. Udall* (C.A.D.C. 1966).

[8] 145 F.2d at 896, fn. 5.

before it, acknowledged their value, stating as follows:[9]

> Unquestionably, the grazing permits were of value to the ranchers. They were an integral part of the ranching unit — indeed, the fee lands are practically worthless without them. But, "the existence of value alone does not generate interests protected by the Constitution against dimunition by the government, however, unreasonable its action may be." *Reichelderfer v. Quinn*, 287 U.S. 315, 319, 53 S.Ct. 177, 178, 77 L.Ed. 331. The Constitution requires only that the sovereign pay just compensation for that which it takes, "not for opportunities which the owner may lose." *United States ex. rel. T.V.A. v. Powelson*, 319 U.S. 266, 282, 63 S.Ct. 1047, 1056, 87 L.Ed. 1390. Just compensation for that which is taken does not include consequential losses to owner. *Mitchell v. United States*, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644; *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729; *United States v. Willow River Power Co.*, 324 U.S. 499, 510, 65 S.Ct. 761, 89 L.Ed. 1101; *United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 87 L.Ed. 366. "Such losses may be compensated by legislative authority, not by force of the Constitution alone." *United States v. Willow River Power Co.*, supra, 324 U.S. at page 510, 65 S.Ct. at page 767, 89 L.Ed. 1101.
>
> * * * But, in our view, there can be no legally significant difference in the withdrawal of the permits for war purposes by the Secretary of the Interior, as in the Osborne case, and the cancellation of the permits by a declaration of taking in condemnation proceedings. *In either case, the Government, by appropriate action, has exercised its unquestionable power to take only that which it owns, and in which the condemnee has no compensable interest.* * * * (Emphasis supplied.)

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[9] 190 F.2d at 295.

Appellants urge that the Atomic Energy Act of 1946, as amended,[10] requires the United States in condemnation to pay for the revocation of a right to enter. While it is true Section 171 of the Act requires that just compensation be awarded for property or interests therein taken or requisitioned, appellants overlook the fact that they held only licenses which, as previously noted, do not fall within the meaning of private property under the Fifth Amendment.[11]

Since appellants held revocable prospecting permits which were not property rights for which compensation must be paid under the Fifth Amendment upon withdrawal, summary judgment was correctly entered against them.

Appellant Clifton separately has raised additional issues alleging error below. We have examined these and find them to be without merit.

The judgment is affirmed.

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[10] 68 Stat. 952, 42 U.S.C. 2221.

[11] *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281 (1943).

APPENDIX B

No. Civ-2802-Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

869,981 ACRES OF LAND, more or less, in Yuma County, Arizona; TOM WELLS; FROST SNYDER, et al, and the UNKNOWN OWNERS AND CLAIMANTS of certain land in Yuma County, Arizona

Defendants.

No. Civ-4284-Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

869,981 ACRES OF LAND, more or less, in Yuma County, Arizona; TOM WELLS; FROST SNYDER, et al, and the UNKNOWN OWNERS and CLAIMANTS of certain land in Yuma County, Arizona,

Defendants.

ORDER

The above entitled cause came on for hearing before the Court upon the defendants' motion for summary judgment and plaintiff's motion for summary judgment, on October 17, 1966.

The positions of the respective parties were argued to the Court in support of the respective motions. Memoranda in support of the respective motions were filed with the Court by both parties.

The record discloses that the within action is based upon the condemnation of certain premises described in

the pleadings within the Yuma Test Station which are public lands within the jurisdiction of the Department of the Army of the United States. It appears that defendants, within the purview of the Atomic Energy Act of 1954, 42 USC 2011, et seq. secured certain permits for the purpose of prospecting for uranium from the United States Atomic Energy Commission, pursuant to the provisions of Title 10 C.F.R. 60.9. Title 10, C.F.R. 60.9 specifically provides that where permits have been issued for the purpose of prospecting for uranium upon lands administered by other governmental agencies those agencies may prescribe additional terms and conditions to permit such agencies to fulfill appropriately their functions and obligations. In the alternative, such agencies may refrain from issuing permits upon such lands.

Pursuant to the authority granted such agencies, supplemental conditions were added to the permits issued by the United States Atomic Energy Commission by the Department of the Army through its Chief of Engineers and the Commander of the Yuma Test Station. Additional Stipulation Under Uranium Prospecting Permit Arizona, condition number 5 of the addenda, provides:

> "The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part at any time as he deems it required by military necessity. Such withdrawal may be only temporary or permanent and may be without prior notice, in which event it is agreed that evacuation will be made with the greatest possible expediency, as to personnel and equipment."

The explorations of defendants on the premises in question were made pursuant to the permits, including the addenda. This Court does not concur in the interpretation of Title 42 U.S.C. 2096 propounded by defendants.

This Court does not believe the cases of *Admiral Oriental Line v. U.S.*, 86 F.2d 201 and *Werner v. U.S.*, 188 F.2d 266 to be in point. The nearest authority in point cited by the defendants is *U.S. v. Town of Nahant*, 153 F. 520. But in *Nahant* there was distinguishing circumstances in that the United States was condemning for a paramount public use property previously condemned by the Town of Nahant for a public use. The issue in that case being the validity of the original condemnation by the Town, the Court of Appeals of the First Circuit having held in that case that there was sufficient interest on behalf of the Town in the property in question to be compensable. In *U.S. v. Cox*, 190 F.2d 293, the Court of Appeals for the Tenth Circuit held in effect that grazing rights within the purview of the Taylor Grazing Act, as amended, while they might have value to the ranchers using them, were not interests protected by the Fifth Amendment against the taking by the Government who granted the permits with the understanding that they could be withdrawn at any time without the payment of compensation. See also: *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, and *Osborne v. U.S.*, 145 F.2d 892.

The reservations in the permits in question specifically contemplated the withdrawal of the lands in question and the termination of the permits, which act was accomplished upon the institution of these condemnation proceedings. The defendants acquired the permits with full knowledge of the risks to be incurred.

WHEREFORE, IT IS ORDERED that the motion for summary judgment of plaintiff be granted, and that the motion for summary judgment of the defendants be denied.

Dated this 3rd day of November, 1966.

/s/ WALTER E. CRAIG
United States District Judge